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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 216

UNITED GAS PIPE LINE COMPANY, a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

C. HUFFMAN LEWIS
1525 Slattery Building
Shreveport, Louisiana

W. SCOTT WILKINSON
1525 Slattery Building
Shreveport, Louisiana

GEO. D. FISER
United Gas Building
Shreveport, Louisiana

Counsel for Petitioner
United Gas Pipe Line Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

United Gas Pipe Line Company, Petitioner, prays that a writ of certiorari issue to review the opinion, decision, and the judgment and decree of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 5, 1950.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 349) is reported at 181 F. (2d) 796. Its judgment and decree of dismissal appears at R. 355.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) (R. 280) and Sections 239 and 240 of the Judicial Code, as amended, 28 U.S.C. 346 and 347. The original opinion and judgment of the lower Court was entered on April 5, 1950. The petition for rehearing was denied on May 31, 1950.

STATUTES INVOLVED.

Administrative Procedure Act, Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*

Natural Gas Act, Act of June 21, 1938, c. 556 (52 Stat. 821), U.S.C., Title 15, §§ 717-717w. All sections of said act referred to will be found at R. 277 to 282, inclusive.

STATEMENT.

On October 30, 1948, the Federal Power Commission, Respondent, issued its Order No. 144 (R. 227) amending its regulations governing the form, composition, substance and filing of schedules of rates and charges for the transportation and sale for resale of natural gas in Interstate Commerce. The regulations promulgated by said order are shown in R. 231 to R. 256, inclusive. The said Order No. 144 was issued in a so-called rule making proceeding, Docket No. R-107 of the Federal Power Commission. Petitioner appeared in said so-called rule making proceeding and by proper pleadings (R. 27, 36, 49, 91, 257) and by oral argument (R. 102-120, 142-145) demonstrated that the proposed rules subsequently promulgated by Order No. 144 required the abrogation and breach of many of Petitioner's contracts for the transportation and sale of natural gas subject to the jurisdiction of Respondent, which contracts had been validly executed and approved by the Commission and were in the course of performance, and that said proposed rules prohibited the supplementation, extension or renewal of all of petitioner's said contracts, many of which,

e. g., percentage contracts, contemplate and require supplementation.

Under Section 5(a) of the Natural Gas Act (R. 279) Respondent was prohibited from so affecting Petitioner's said contracts except after a hearing and a justified finding of fact upon proper evidence that said contracts and the extension and supplementation thereof were unjust, unreasonable, unduly discriminatory or preferential.

Respondent refused to hold a hearing including the introduction of evidence and examination and cross-examination of witnesses, taking the position that no such hearing was required and issued its order "without passing upon the validity of the industry contention" (R. 229), after which Petitioner duly and timely applied for a rehearing and pointed out that such an order vitally affecting matters of substance would be invalid without a hearing, and again demanded a hearing (R. 257). On December 21, 1948, Respondent issued its order denying Petitioner's application for a rehearing (R. 274).

Thereafter, Petitioner duly and timely filed its Petition for a Review of Order No. 144 of Respondent, (R. 287) and of its Order issued December 21, 1948, denying Petitioner's application for rehearing (R. 274).

In compliance with Section 19(b) of the Natural Gas Act, (R. 280) Respondent on the 30th day of August, 1949, filed in the lower Court its certified record of the proceedings before it (R. 341-348). The Court below issued its opinion on April 5, 1950 (R. 349) and its judgment of dismissal on the same day (R. 355).

On the 17th day of April, 1950, Petitioner filed its application for a rehearing (R. 356) which was denied by the lower Court on the 31st day of May, 1950 (R. 368).

QUESTION PRESENTED.

The one basic question is: Should the lower Court have held that Respondent should have held a hearing under Section 5(a) of the Natural Gas Act (R. 279) before issuing

its Order No. 144 (R. 227), i.e., was such a hearing necessary for the validity and enforceability of said order?

The question of the substantive validity of Order No. 144 if issued after a real hearing is not presented.

The question on the merits as to whether Petitioner's said contracts and practices are unjust, unreasonable, unduly discriminatory or preferential is not presented.

SPECIFICATION OF ERRORS.

1. The lower Court erred in not holding that Order No. 144 of Respondent was null and void because no hearing was held, or in the alternative, in not ordering a hearing under penalty of nullity.

2. The lower Court erred in dismissing the petition for review.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The impact of the opinion of the lower Court is national in its effect because it affects the scope of the rule making power of every administrative agency of the Federal Government, and particularly the right of a party affected to obtain a Court review under the statute creating the agency. This is especially true of parties seeking a Court review under the Securities Exchange Act of 1934,[1] the Federal Power Act,[2] the Public Utility Holding Company Act of 1935,[3] and the Natural Gas Act,[4] because the review provisions of each of the first three named statutes are substantially similar to the review provisions of Section 19(b)

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[1] Act of June 6, 1934, 48 Stat. 881, 15 U. S. C. 78a-78jj.

[2] Act of June 10, 1920, c. 285, 41 Stat. 1063, as amended by Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a-825r.

[3] Act of August 26, 1935, c. 687, 49 Stat. 803, 15 U. S. C. 79-79z-6.

[4] Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U. S. C. 717-717w.

of the Natural Gas Act (R. 280 and 281), which is involved in the instant case.

The opinion of the lower Court will, if unreversed, be cited as authority for the proposition, especially under the above statutes, that regardless of the impact of rule making, and the fact that it may be adjudicatory in character and a hearing be required by the applicable act, there can be no Court review under the statute creating the agency, if no hearing be held, as long as the proceeding is labelled "Rule Making".

Petitioner, as a natural gas pipe line company, is one of the hundreds of electric power and natural gas companies subject to the plenary regulatory powers of the Federal Power Commission. Additional hundreds of companies are subject to the regulatory powers of the Securities and Exchange Commission. Prior to the decision of the Court below, such companies had assurance from applicable statutes, as interpreted by the courts, that the named regulatory agencies could not, by the artful use of the "Rule Making" label, and the careful avoidance of holding a real record hearing, prevent direct judicial review of adjudicatory action on substantive matters. This assurance was found in the provisions of the basic acts conferring regulatory powers which make the exercise of such powers subject to direct court review,[5] and in the rationale of decisions of this and other courts as hereinafter cited and discussed.

The opinion and decision of the Court below has destroyed such assurance and has made the right of direct review in the courts charged with judicial supervision of the regulatory agencies dependent upon the particular agency's willingness to recognize in express terms that its action is controlled by a specific provision or provisions requiring a record hearing. The truth of the foregoing statement can best be ascertained by a reading of the lower Court's opinion in its entirety (R. 349). Without intend-

[5] Natural Gas Act, *supra*, Section 19(b); Federal Power Act, *supra*, Section 313(b); Securities Exchange Act of 1934, *supra*, Section 25(a); Public Utility Holding Company Act of 1935, *supra*, Section 24(a).

ing that the language be considered out of context, but as aptly emphasizing the reason for the granting of the writ as here presented, we quote in the footnote three excerpts from the opinion below, with emphasis supplied.[6]

Because of the importance of the United States Court of Appeals for the District of Columbia Circuit as the court of review most generally applied to by parties aggrieved by regulatory commission orders, the departure of that Court from the rationale of earlier decisions, including its own, is submitted to be of national import. We do not think it strained to say that the entire operation of administrative agency procedure and direct court review thereof is vitally affected.

II.

The lower Court, by the Petition for Review, was asked to determine that a hearing was necessary under Section 5(a) of the Natural Gas Act for the validity of Order No. 144 of Respondent.

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[6] "As petitioner views the case, although the regulations are procedural in form and superficially prospective in nature, they will in reality work a change in rates, cause certain provisions to be eliminated from its contracts, and will be retroactive in effect. Thus the argument proceeds, a quasi-judicial hearing has been denied where it should have been granted for, under Section 5(a) of the Natural Gas Act, 15 U. S. C. A. § 717d(a), rates may be changed by the Commission only after a hearing is held and they have been found to be unjust and unreasonable. *Since Commission acceptance of this view would have resulted in an order reviewable under Section 19(b)*, 15 U. S. C. A. § 717r(b), it is contended that, even absent such acceptance, review may be obtained here under that section. * * * " (R. 350)

* * * * * *

"* * * Although the distinction between rule and order is not always clearly definable, our authority to review orders of the Federal Power Commission under the Natural Gas Act does not suffer the same weakness. Not all orders were made reviewable under Section 19(b). As in the analogous provision of the Federal Power Act, Congress set out 'a distinctive formulation of the conditions under which resort to the courts may be made.' On its face, the Act contemplates review of a decision based on evidence presented in a quasi-judicial proceeding before the Commission. It specifies that the Commission shall file with the proper circuit court of appeals 'a transcript of the record upon which the order complained of was entered * * *.' 'The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive,' etc. *Unless the case comes to us after such a proceeding*, we are given no authority to directly review the Commission's action." (R. 351)

* * * * * *

"This is not a case *where the Commission has asserted authority under one of the many sections of the Act which specifically require a hearing.* If a hearing had been denied under such circumstances, we would have no difficulty in ordering one to be held. * * *" (R. 352)

Said section of the Natural Gas Act mandatorily requires a real record hearing and a justified finding of facts before the contracts and practices of Petitioner, theretofore recognized as valid by Respondent, could be abrogated or changed.

If a hearing was necessary the lower Court could have ordered one held under penalty of nullity.

Because there was no hearing on the merits, the lower Court was not required to pass on the merits or demerits of any contract or business practice, or on the merits or demerits of Order No. 144.

The lower Court held in effect that there can be no Court review under Section 19(b) unless a record hearing on the merits be held.

This means that Respondent could do anything lawful or unlawful and by refusing a hearing on the merits even though one be required by Section 5(a) of the Natural Gas Act prevent a review of its action under Section 19(b) of the Natural Gas Act.

III.

If the proceedings leading up to the adoption of the challenged Order No. 144 be tested under the Administrative Procedure Act, *supra,* it appears clear that the Commission violated that Act in refusing to hold a hearing in this matter.

The Administrative Procedure Act, Section 4(b), provides "* * * Where rules are required by statute (such as Section 5(a) of the Natural Gas Act) to be made on the record after opportunity for an agency hearing the requirements of sections 7 and 8 (which require a real record hearing) shall apply * * *" (Parenthetical insertions ours).

Since 5(a) of the Natural Gas Act (R. 279) prohibits the change in "any rate, charge or classification, * * * or any rule, regulation, practice or contract" affecting same without a real hearing, it distinctly restricts what can be done

under the Administrative Procedure Act under the guise of "Rule Making".

IV.

The lower Court was required to consider and act upon the entire record and admissions before it, and to determine if a hearing was necessary. To the contrary its opinion concedes that it is based merely on the proposition that there was not sufficient evidence before it to enable it to decide this case on the merits, i.e., as to whether the contracts and practices of Petitioner are in fact unjust, unreasonable, unduly discriminatory or preferential (R. 349). The lower Court was not asked to decide this cause on the merits.

As we shall hereinafter point out there was an abundant record before the lower Court to enable it to decide whether a hearing was necessary for the validity of Order No. 144. In addition important admissions were made by Respondent.

The opinion and decision of the lower court shows on its face (R. 352) that it was based "merely on the basis of allegations in a Petition for Review".

The admissions made by Respondent which are set forth in paragraph 5 of Petitioner's Petition for Rehearing (R. 361), and hereinafter discussed, were apparently ignored.

V.

The opinion of the lower Court is in direct conflict with the reasoning of three other decisions of the same Court, and with a decision of this Court. These cases are:

1. *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission,* 93 F. 2nd 236.
2. *Philadelphia Co.* v. *Securities and Exchange Commission,* 164 F. 2nd 889 (Writ of Certiorari denied February 2, 1948).
3. *Philadelphia Co.* v. *Securities and Exchange Commission,* 175 F. 2nd 808.
4. *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; 62 S. Ct. 1194, 86 L. Ed. 1563.

1. The *Sumatra Case, supra,* involved a petition for review under Section 25(a) of the Securities Exchange Act of 1934; Act of June 6, 1934, 48 Stat. 881, 901, 15 U. S. C. 78a, 78y(a), which is similar to the review provisions of Section 19(b) of the Natural Gas Act (R. 280).

In this case the Securities and Exchange Commission made the same basic argument that Respondent made before the lower Court in the instant case. The Court said on page 238 of the opinion:

> "The position which the Commission takes is that a reviewable order within the contemplation of section 25(a) is one entered only after notice and opportunity for hearing, and upon a finding of fact. * * *"

The Court definitely rejected the Commission's arguments and said on page 241, "* * * Under our construction of the Act there will be a record, and sufficient evidence upon which to test the conclusion reached. * * *"

Petitioner shows that there was before the lower Court "a record and sufficient evidence upon which to test the conclusion reached," and it was a basic error for the lower Court to disregard that record, and the admissions in Respondent's brief filed in the lower Court, said brief being hereinafter referred to as Exhibit 1.[1]

2. In the *Philadelphia* case (164 F. 2nd 889), a review was sought under Section 24(a) of the Holding Company Act, 15 U. S. C. Section 79x(a). This section is almost identical with the review provisions of the Natural Gas Act, Section 19(b) (R. 280).

This case involved "rule making" and the Respondent Commission sought to escape judicial review by making the same argument that Respondent made in the instant case, i.e., that since no evidence was taken there was no record upon which review could be had.

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[1] At the express request of Petitioner, the Clerk of the lower Court has certified the brief filed by Respondent therein, and the certified copy thereof and ten additional copies have been lodged with the Clerk of this Court for use in connection with this petition, as Exhibit 1 hereto.

The Court flatly rejected Respondent's argument and said with respect to the record before it on page 890:

> "* * * The relevant facts are either alleged in the petition for review and admitted, for the purposes thereof, by the motion to dismiss (cf. American Sumatra Tobacco Corporation v. Securities and Exchange Commission, 1937, 68 App. D. C. 77, 93 F. 2nd 236), or are stated in the brief of Philadelphia and treated as true, or not denied, in the brief of the Commission. * * *"

3. In the *Philadelphia* case, *supra,* 175 F. 2nd 808,[1] review was sought under Section 24(a) of the Holding Company Act, *supra,* and the Respondent Commission sought to escape review by making a somewhat similar argument to that made by Respondent in the instant case.

As noted above, the review provisions of Section 24(a) of the Holding Company Act are almost identical with the review provisions of Section 19(b) of the Natural Gas Act.

This Philadelphia case was another "rule making" case and the Court found that the record before it was so incomplete that it could not decide the case on the merits, but DID DECIDE that a hearing was necessary and ordered one.

The Court said on page 819:

> "Whether or not material issues of fact exist we can determine only after an appropriate hearing and a proper record."
>
> * * * * * *
>
> "We cannot now determine the validity of the Commission's order on the merits. As we point out in the WJR case, to do so would be to omit to recognize the distinction between questions of correct procedural action and questions of correct decision on the merits. Whether the Commission was under a duty to accord a quasi-judicial hearing to Philadelphia, including allocation to the Commission of the burden of proof, is a procedural question quite separate from the question

[1] Certiorari granted, 337 U. S. 901. Appeal ordered dismissed as moot because of settlement.

on the merits whether or not the order of the Commission had a rational and lawful basis. * * *"

4. In the *Columbia Broadcasting* case, *supra,* rule making was involved and this Court said:

> "* * * The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack. It is because they are an exercise of the rule-making power, and because they presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them, that there is an order within the meaning of Section 402(a) and the Urgent Deficiencies Act."
>
> * * * * *
>
> "* * * The ultimate test of reviewability is not be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

In the instant case, purporting to exercise rule making power, the Commission adopted rules and regulations whose operation is not made subject to the contingency of future administrative action. The impact of the rules is immediate and final upon existing and future contracts and business relationships of Petitioner and determine, prescribe and control the Commission's conduct in advance of future administrative action. The impact in the instant case is direct whereas in the Columbia case it was indirect.

VI.

The opinion of the lower Court (R. 349) states:

> "For we are asked to pierce form and find substance, to make an important decision concerning the scope of the Commission's regulatory authority, merely on the basis of allegations in a Petition for Review. The cen-

> tral question here is the effect of Order No. 144 on certain contracts of petitioner. Yet we do not even have such contracts before us as part of the record. Nor do we have the aid of testimony, affidavits, etc. It is clear to us that decisions of this kind cannot be made in vacuo; and that Congress realized it when it made our review dependent upon the sort of conditions contained in Section 19(b)."

The central question was not as above stated. The central question was whether a hearing should have been held. The statement that the Court had no affidavits before it is not correct. The entire position of Petitioner was submitted under oath. See affidavit of M. A. Abernathy, Vice-President of Petitioner (R. 49 to 54, affidavit on page 54. See also affidavit of same official R. 262).

The above affidavits were certified by Respondent to the lower Court as a part of the record before it. This is shown by the letter of transmittal and the certification of Respondent (R. 341, 342). It is to be noted that the record certified by Respondent to the lower Court is very voluminous and consists of approximately 103 documents aggregating 878 pages in three volumes.

The petition for rehearing pointed out in paragraph 5 thereof (R. 361) the many admissions made by Respondent in its brief (Exhibit I) and otherwise to the effect that certain illustrative contracts, i.e., percentage contracts and tax clause contracts [the nature of which were fully explained by Petitioner under oath (R. 49-54, 257-263), and by the oral argument of Petitioner's Counsel before Respondent (R. 102-120, 142-145)] were abrogated, prohibited or changed by Order No. 144.

Under the rules of the lower Court, Respondent had ten days after the Petition for Rehearing was filed to answer and to deny or repudiate said admissions and to deny that Petitioner's contracts, rates, schedules, charges and method of doing business were substantially modified, changed or prohibited by said Order No. 144. It is submitted that the

failure of Respondent to answer as above set forth is not without weight in assaying the allegations of the Petition for Rehearing (R. 357) and of the Petition for Review (R. 287).

VII.

As pointing out one of the reasons relied on why the writ of certiorari should issue herein, we desire to call the Court's attention to the following statement in the opinion of the lower Court (R. 353):

> "The present case is quite different. We have before us a rule directed to all companies similarly situated, and we have the Commission's binding assurance that the regulations will operate only prospectively.[6] Under such circumstances, there is at the very least a strong presumption that the Commission has merely promulgated regulations of general applicability and not orders reviewable under Section 19(b)."

And also to footnote 6 referred to in said statement giving a statement by Respondent which reads:

> "[6] In response to petitioners' argument that such regulations will not be merely prospective, the Commission reaffirmed its position, which was made a part of the stay order in the present case (issued February 28, 1949), that it 'interprets Order No. 144 as not authorizing the making of any change in an effective rate, charge, or contract provision, without compliance with the Natural Gas Act, as amended.' "

The statement in the opinion is not justified by the statement of Respondent as set forth in said footnote, and apparently, the Court was misled thereby.

To say the least, Respondent's statement is most ambiguous, and Respondent has in fact taken the position as will be hereinafter pointed out, that changes in an effective rate, charge or contract provision may be accomplished through so-called "rule making" instead of through a hearing and a finding of fact as required by Section 5(a) of the Natural Gas Act.

Respondent made admissions in its brief in the lower Court which are in conflict with the lower Court's statement that the new regulations operate only prospectively (see Exhibit I). This is shown by paragraphs 5 and 6 of the Petition for Rehearing (R. 361, 363).

As illustrative of the impact of the new rules on existing contracts, Petitioner has alleged and Respondent has not denied, and we confidently assert will not deny that existing tax clause contracts [fully explained and specifically illustrated in paragraph VII of the Petition for Review (R. 296)] are prohibited by the new rules and particularly Section 154.38(d) thereof. This section is quoted in a footnote to the Opinion of the lower Court (R. 350).

Percentage contracts which are fully explained and specifically illustrated in paragraph VIII of the Petition for Review (R. 299) require supplementation and amendment, as pointed out in said paragraph VIII, and without such supplementation and amendment, they become sterile and cannot function.

Respondent has not and will not deny that the supplementation and amendment of existing percentage contracts, which have been approved by Respondent (and which supplementation and amendment have been permitted for more than ten years by Respondent, and never prohibited until by said Order No. 144) are now by the last paragraph of Section 154.85 of the new rules prohibited (R. 251).

The foregoing demonstrates that the new rules do not as stated by the lower Court "operate only prospectively."

But assuming (which we deny) that they do "operate only prospectively," such would not make them valid. This points out an error into which the lower Court has fallen. In the *Columbia Broadcasting Case, supra,* this Court held that rules operating prospectively could have such an impact as to require a real hearing as a condition precedent to validity.

The new rules require the Respondent to reject any new tax clause and percentage contracts in the future, thus pre-

senting a similar question to that before this Court in the *Columbia Broadcasting Case.*

VIII.

Tax adjustment clause contracts are specifically named and prohibited by Section 154.38(d) of the new rules (R. 241). Tax adjustment clauses are not mentioned in the Natural Gas Act and particularly in Section 4(d) thereof (R. 277). The passing on of any part of an increased tax is not a change in a rate because the seller does not receive and keep any portion of the tax passed on. The seller remits 100% of the tax to the tax collector. See footnote 58 page 44 of Exhibit 1 and page 52 thereof, where Respondent admits, and cites authority, that a rate is the net amount received and **retained** by the seller.

For the first time tax adjustment clauses are specifically prohibited by Section 154.38(d) of the new rules. The rules and regulations of Respondent which were in effect prior to said Section 154.38(d), (which by said Order No. 144 became effective December 1, 1948) did not refer to or prohibit tax adjustment clauses. The said prior rules and regulations, as admitted by Respondent, are shown at R. 326, 327. A reading of the Natural Gas Act and particularly Section 4(d) thereof (R. 277) shows that tax adjustments are not prohibited by said Act.

Respondent states (Exhibit 1, page 50) "* * * that prohibition merely restates the filing requirements of Section 4(d) of the Act."

The above admitted prohibition of Section 154.38(d) of the rules is not a restatement of Section 4(d) of the Natural Gas Act as will be shown by a comparison of the two, through a reference to R. 241 and R. 277, respectively.

There can be no question but that Respondent admits (Exhibit 1, pages 45 and 46) that Section 154.85 prohibits amendments and supplementation of contracts. It is stated, "Thus, the former confusing practice of unlimited supplementation was prohibited." There is also here the inherent

admission that prior to the new rules Respondent permitted unlimited supplementation. In addition to this see specific admission of counsel for Respondent that the practice under the old regulations prior to December 1, 1948, was to permit such supplementation (R. 326).

There can be no question but that Respondent admits that percentage contracts are prohibited in the future, (Exhibit 1, page 53) and as aforesaid that existing percentage contracts are frozen for the reason that they cannot be amended except by a superseding contract which must meet the requirements of Section 154.38(d) of the new rules and this prohibits percentage contracts because they are not stated in dollars or cents per unit.

The lower Court should have given effect to these admissions; they were specifically referred to in the Petition for Rehearing.

IX.

By the record and the admissions of Respondent in Exhibit 1 which we have pointed out above, it has been demonstrated that Order No. 144 of Respondent is adjudicatory as to Petitioner in that its contracts and business practices have been condemned.

Such condemnation, including the abrogation, prohibition and changing of Petitioner's contracts, cannot legally be accomplished except after a hearing and a justified finding of fact upon proper evidence that such contracts and business practices are (as required by Section 5(a) of the Natural Gas Act) unjust, unreasonable, unduly discriminatory or preferential.

The following authorities abundantly sustain the foregoing:

In *Colorado Interstate Gas Co.* v. *Fed. Power Com'n.*, 142 Fed. (2d) 943, 954, aff'd., 324 U. S. 581, 65 Sup. Ct. 829, the Court pertinently observed:

> "The passage of the Act did not automatically overthrow the contracts into which these companies had

previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. *Such rates and charges could be modified only after an express finding of unreasonableness.* Wichita R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F. 2d 881. And *the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact.* In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431." (Emphasis ours)

As the lower Court had occasion to observe in *Philadelphia Co.* v. *S. E. C.*, 175 F. (2d) 808, 817:

"It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution. * * * "

"It follows from the foregoing and from the facts set forth at the outset of this opinion that the Commission's 'hearing' on the proposed amendment of Rule U-49(c) was inadequate as to Philadelphia. The Commission permitted only the submission of data, views and comments and the making of oral argument. It failed, so far as is shown by the record certified to this court, except by its vague references to its 'experience' under Rule U-49(c) and to 'situations in which the security structures of registered holding companies and their subsidiaries are entangled,' to apprize Philadelphia of the facts upon which its proposed action amending Rule U-49(c) was to be taken (thereby making futile Philadelphia's offer of proof); and it failed

to introduce or receive evidence, to hear witnesses, to permit cross-examination, and to make a proper transcript of record. Accordingly its 'hearing' did not satisfy the requirements, for adjudicatory action, of either the due process clause, the Holding Company Act, or the Commission's own rule. The Commission erroneously failed to assume the burden of proof in respect of the propriety of its proposed action. It was obliged to observe 'the essential rules of evidence.' Cf. Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 1913, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431. With some exceptions not here pertinent the burden of proof lies upon him who affirms, not him who denies. 1 Jones, Evidence in Civil Cases (4th ed. 1938) Sec. 180; Stephen, Digest of the Law of Evidence (12th ed. 1946) Article 100. On the contrary of assuming the burden of proof the Commission, as appears from the statement of facts at the outset of this opinion, required Philadelphia to attempt to persuade it that the exemption afforded Pittsburgh by Rule U-49(c) should not be revoked. We hold accordingly that the Commission's order was invalid for lack of a proper hearing."

In *Mallory Coal Co.* v. *National Bituminous Coal Com'n.*, 69 App. D. C. 166, 99 F. (2d) 399, the lower Court referred to the *American Sumatra Tobacco Corp.* case (93 F. 2nd 236) and stated at page 406:

"We held in the Sumatra Case that the order of the Commission might be subjected to review even though no hearing was held and no findings made to support the order, on the theory that under the circumstances of that case it was the duty of the Commission to hold a hearing and make findings. The failure, therefore, of an administrative agency to comply with its duty in this respect will not cut off the privilege and power of judicial review. In the same way, the action of such an agency in holding a hearing and making findings, under circumstances which do not call for such procedure, will not give a resulting order reviewable character, when otherwise it would not be subject to review. Thus, it is not the mere arbitrary occurrence of notice, hearing

and findings — or the absence thereof — which determines whether an order is reviewable, but rather the fact that the order is of such character that it should have been preceded by a hearing and supported by findings."

In *American Federation of Labor* v. *National L. R. Board,* 308 U. S. 401, 60 Sup. Ct. 300, the Court observed at page 408:

"* * * Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders'. See Rochester Telephone Corporation v. United States, 307 U. S. 125, 130, 135, et seq., 59 S. Ct. 754, 757, 759, 83 L. Ed. 1147; Federal Power Commission v. Pacific Power & Light Co., 307 U. S. 156, 59 S. Ct. 766, 83 L. Ed. 1180. We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the 'order' for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions."

The situation presented in the present case is, with respect to the particular matter under consideration, very similar to the case of *Philadelphia Company* v. *Securities & Exchange Commission,* 164 F. (2d) 889, decided by the lower Court on October 8, 1947 (writ of certiorari denied February 2, 1948. See 68 S. Ct. 452).

The factual situation in that case is concisely set forth on page 893 of the opinion, reading as follows:

"* * * The Commission first published, on November 25, 1946, as Holding Company Release No. 7011, 'Notice of Proposed Rule Amending Rule U-49(c) Under the Public Utility Holding Company Act of 1935.' This notice granted leave to file 'data, views and comments.' Philadelphia timely requested a hearing on the proposed amendment so conducted as to apprize all parties of the facts upon which a decision to adopt the pro-

posed amendment to Rule U-49 might be predicated and and as to permit cross-examination of witnesses, introduction of rebuttal evidence by any interested party, as to apprize each party of the data, views, comments and evidence of the other parties, and as to afford a stenographic record of the evidence in support of and in opposition to the proposed amendment. This request was denied by the Commission. The latter, after permitting Philadelphia to make oral argument, adopted on February 28, 1947, the amendment to Rule U-49(c), the lawfulness of which Philadelphia by virtue of the petition in the instant proceeding, seeks to review.* * *"

On page 900 of the Opinion the Court said:

"* * * But not even the fact that the action of an administrative agency is phrased to apply generally, or may indeed have general application, is necessarily conclusive that its action is not subject to review as an 'order' under the Urgent Deficiencies Act as extended by the Communications Act, or under Section 24(a) of the Holding Company Act. If in its impact a 'rule or regulation' applies specifically and affects or determines the rights of a particular person or corporation, then the action of the agency in promulgating it is reviewable even though the 'rule or regulation' is not directed in terms to any particular person or corporation. This is evidenced by the ruling of the Supreme Court in the Columbia System case just cited. There the Federal Communications Commission by an 'order' promulgated regulations purporting to require the Commission to refuse to grant a license to any broadcasting station which entered into chain broadcasting contracts with any broadcasting network organization. The Commission had acted, as the Court said in its opinion, 'in the avowed exercise of its rule-making power.' * * *"

X.

The lower Court, for the foregoing reasons in the very words of Rule 38 of this Court "* * * has so far departed from the accepted and usual course of judicial pro-

ceedings'' and ''decided a question of general importance'' * * * ''as to call for an exercise of this Court's power of supervision.''

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. HUFFMAN LEWIS
1525 Slattery Building
Shreveport, Louisiana

W. SCOTT WILKINSON
1525 Slattery Building
Shreveport, Louisiana

GEO. D. FISER
United Gas Building
Shreveport, Louisiana

Counsel for Petitioner
United Gas Pipe Line Company

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